

January 23, 2001

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REVISED REPORT AND DECISION ON APPEAL OF NOTICE AND ORDER

SUBJECT: Department of Development and Environmental Services File No. **E9900061H**

TASTE OF THAI
Code Enforcement Appeal

Location of Violation: 4560 (aka 4512) Klahanie Drive Southeast

Appellant:	Taste Of Thai, <i>represented by</i>	Patrick J. Schneider & Katriana L. Samiljan
	4512 Klahanie Dr SE	Stoel Rives Attorneys
	Issaquah, WA 98029	600 University Street #3600
		Seattle, WA 98101-3197
		Telephone: (206) 624-0900

King County: Department of Development and Environmental Services
Building Services Division, Code Enforcement Section
represented by **John Briggs**
Office of the Prosecuting Attorney, Civil Division
King County Courthouse, 516 Third Avenue, Seattle, WA 98104
Telephone: (206) 296-9015
Facsimile: (206) 296-0191

SUMMARY OF DECISION:

Department's Preliminary Recommendation:	Deny the appeal
Department's Final Recommendation:	Deny the appeal
Examiner's Decision:	Deny the appeal

EXAMINER PROCEEDINGS:

Hearing Opened:	December 1, 2000
Hearing Closed:	December 1, 2000

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES/TOPICS ADDRESSED:

- Commercial signs – height, location and type
- Freedom of speech
- Hearing Examiner jurisdiction
- Substantive due process

SUMMARY:

Taste of Thai's appeal of the supplemental notice and order is denied.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. On July 25, 2000 a supplemental notice and order was issued to Holgate/Klahanie, LLC, Claremont Development Company and Taste of Thai, citing the Taste of Thai commercial leasehold for the unlawful placement of signage on the rear wall of the building. The allegation is that the rear wall sign violates the rezone conditions applicable to the property adopted by the King County Council under authority of Ordinance No. 10996.
2. The supplemental notice and order supersedes a notice and order issued on February 16, 2000, and differs from the original document primarily in that it seeks to modify building permit No. B99A1147. The supplemental notice and order asserts that "permit B99A1147 was issued in error as it authorized the sign on the rear of the building to be installed in violation of the rezone conditions..."
3. Under authority of Ordinance No. 10996 the King County Council adopted a rezone recommendation dated July 28, 1993 imposing strict on-site signage conditions on retail businesses within the Klahanie Commercial Center. As stated by the rezone decision, the purpose of these signage limitations is to rationalize placement of an urban shopping center along the Urban Growth boundary adjacent to rural properties to the south. The rezone conditions seek to limit the visual impacts of Klahanie Commercial Center signs on nearby residential properties by controlling their size, height and location.
4. Taste of Thai has appealed the supplemental notice and order. An amended appeal statement filed on August 15, 2000 includes constitutional defenses as well as questions of code interpretation. As agreed by the parties, the issues on appeal are whether the sign mounted on

the rear wall of the Taste of Thai leasehold building violates rezone condition No. 28 because its highest point extends above 10 feet finished grade as measured from the bottom of the rear wall, and whether such sign violates condition No. 30 of the rezone, which requires that “only directional signs shall be permitted on the rear of a building.” The parties have stipulated that the citation within the supplemental notice and order referring to a violation of rezone condition No. 29 shall be dismissed because the Taste of Thai facility is not a free-standing single-user building.

5. The sign cited with the supplemental notice and order is mounted on the western wall of a commercial leasehold building situated at the northwest corner of the Klahanie Commercial Center. The front of the building is on its east side facing an interior parking lot. The western rear wall faces Klahanie Drive Southeast and, across Klahanie Drive to the west, a large complex of residential condominiums. There are six commercial spaces, each measuring 20 feet wide by 60 feet deep, within the northwest leasehold facility. Taste of Thai occupies two leasehold spaces near the south end of the building just north of the Subway sandwich shop. The building currently has 5 restaurant tenants, all of whom have frontage signs facing east into the parking lot. And 3 of the 5 have erected a second set of signs on the rear wall facing Klahanie Drive. A fourth tenant has hung a large fabric banner on the western rear wall.
6. The rear wall signage for Taste of Thai consists of an illuminated sign approximately 2 feet high by 14 feet long. Over 80 percent of the length of the sign consists of the words “Taste of Thai” in red letters, with the remaining portion of the sign comprising of a blue logo. The sign contains no directional information. The portion of the northwest facility rear wall assigned to the Taste of Thai franchise contains a total of 720 square feet. The Taste of Thai rear sign reaches a maximum height of 12 feet 7 inches, measured from the bottom of the wall.
7. International Sign, on behalf of Taste of Thai, obtained a sign permit from King County Department of Development and Environmental Services on March 30, 1999 for construction of on-premises front and rear signs. As shown on the permit drawing, the rear wall sign was projected to reach a height of 14 feet. Three-hundred seventy-nine dollars and eighty-five cents (\$379.85) in permit fees were charged by DDES for the Taste of Thai signs based on an estimated valuation of \$6,000. Pamela Juntara, the owner of Taste of Thai, testified that the rear sign cost approximately \$4,000.
8. Although the record contains testimony from Phil Davidson, the property manager for the Klahanie Commercial Center, and Ken Dinsmore, the DDES Permit Center supervisor, concerning discussions held in 1998 and 1999 concerning the signage requirements for the shopping center, there is no evidence that representatives of Taste of Thai participated in these discussions. Ms. Juntara testified that she had no personal knowledge of the rezone sign conditions until receiving a notice of violation from DDES. However, negotiations for her leasehold space within the Klahanie Commercial Center were handled by her attorney, with the lease having been signed prior to submission of the sign permit application. Exhibit No.7, the package of documents submitted for the Taste of Thai sign permit application, contains a copy of the rezone sign permit conditions.

9. As noted previously, the rear wall signage for Taste of Thai is visible to the residences in the condominium complex located west of Klahanie Drive. The Appellant also submitted photographs demonstrating that the Taste of Thai leasehold space is barely visible from the main Commercial Center parking lot located to its southeast.

CONCLUSIONS:

1. A number of the Appellant's contentions are based on the assertion that the rezone conditions adopted under authority of Ordinance No. 10996 are ambiguous as they apply to the issues underlying this appeal. The assertion is that this ambiguity either requires deference to be given to earlier DDES interpretations as to the meaning of such conditions, or alternatively requires a present interpretation constructed in a manner to avoid potential Constitutional infirmities. With the dismissal of condition No. 29 as a basis for the notice and order, we are presented with the question of interpreting conditions 28 and 30.

2. Rezone condition No. 28 reads as follows:

"Building-mounted signs are not permitted on façades that face either Klahanie Drive or Issaquah/Fall City Road within 150 feet of the north edge of the Issaquah/Fall City Road right-of-way. No building-mounted sign on-site shall extend above 10 feet finished grade or the building façade (wall), whichever is less. No building shall be designed or lighted in a way that makes it function as a sign."

Our reading of condition No. 28 is that it is intended to apply to all buildings within the Klahanie Commercial Center and sets out three unrelated prohibitions. The first sentence asserts that no building-mounted sign may be erected within 150 feet of the Issaquah/Fall City Road right-of-way. It applies to all building walls, whether front, back or side. The second limitation also applies to all building walls within the shopping center and imposes a 10-foot height limit on building-mounted signs. Finally, the third sentence applies to all structures and prohibits the use of structural lights for signage purposes. Only the second sentence of condition No. 28 directly applies to the Taste of Thai notice and order citation, which contains an allegation that the rear signage exceeds 10 feet in height.

3. Rezone condition No. 30 reads as follows:

"Only directional signs shall be permitted on the rear of a building. The rear of the building located on Pad D shall be no less than 200 feet from the northern edge of the Issaquah/Fall City Road right-of-way. No exterior lighting, signage or service doors, with the exception of emergency exit doors, shall be located at the rear of the building located on Pad D."

The first sentence of condition No. 30 states a general limitation applicable to all buildings within the shopping center. The remainder of the condition applies only to the building located on Pad D, which is the southernmost structure within the Klahanie Commercial Center. Accordingly, only the first sentence of condition No. 30 applies to Taste of Thai, and the violation alleged within the notice and order is that Taste of Thai contains signage on the rear of its building that is not a directional sign.

4. There is no conflict or inconsistency between the first sentence of condition No. 28 and the first sentence of condition No. 30. Condition No. 28 prohibits signage on any walls within 150 feet of Issaquah/Fall City Road, while condition No. 30 deals with rear building signage wherever located. The provisions overlap to the extent that rear wall signage on a building located within 150 feet of Issaquah/Fall City Road would be prohibited by both conditions. The notion, however, that the first sentence of condition No. 30 ought to be read as referring only to Pad D is contradicted both by the generality of language used and the fact that the rear of Pad D is not adjacent to a parking lot and therefore would not require a directional sign.
5. There is also an important question of hearing examiner jurisdiction that underlies review of the issues raised within this appeal. The Appellant in its amended statement of appeal has raised Constitutional doctrines as a defense to the supplemental notice and order. Since hearing examiners only possess those powers that have been assigned to them by statute or ordinance, the question arises as to whether this forum possess the jurisdictional authority necessary to entertain the Appellant's arguments. Both parties have briefed these issues, with the attorney for DDES arguing that the Examiner lacks the jurisdictional authority to entertain any Constitutional issues.
6. We agree that this restricted view of hearing examiner jurisdiction must prevail when it comes to dealing with facial challenges to the validity of an ordinance or regulation, but where the application of an ordinance or regulation is unclear and the legislative enactment requires interpretation, our view has consistently been that the Hearing Examiner is empowered (and probably required) to provide interpretations of relevant ordinances and regulations in a manner that avoids violating Constitutional principles.
7. Further, the recently enacted provisions of KCC Title 23 confer a measure of authority to recognize relevant Constitutional principles in the review of alleged code enforcement violations. In the Title's purpose section, KCC 23.01.010.B first relates the County's intention to pursue code compliance in order to protect the health, safety and welfare of the general public, but then states that "this County intention is to be pursued in a way that is consistent with adherence to and respectful of fundamental Constitutional principles."
8. Applying KCC 23.01.010.B to the specific context of this appeal, it is our view that the Hearing Examiner has been provided with sufficient authority to recognize Constitutional claims in the application of County regulations in code enforcement proceedings. In this proceeding, the Appellant's Constitutional claims rely on the doctrine of substantive due process and First Amendment rights protecting free speech.
9. The doctrine of substantive due process subjects the operation of regulations to review for reasonableness. The Washington Supreme Court has set out a three-pronged test for determining whether a substantive due process violation has occurred: "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are necessary to achieve that purpose; and (3) whether it is unduly oppressive on the land owner." *Presbytery of Seattle v. King County*, 114 Wn 2nd 320 at 330 (1990).

10. The United States Supreme Court in the leading case of *Metromedia, Inc v. San Diego*, 453 US 490 (1980), has set out the following test for determining the validity of governmental restrictions on commercial speech:

“(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.” 453 US at 507.
11. Both the Appellant’s substantive due process and First Amendment arguments focus on the question of whether the first sentence of rezone condition No. 30 uses means that are necessary and appropriate to achieve its public purpose, and therefore can be said to directly advance such purpose. There is no serious dispute that the essential function of the rezone sign conditions is to protect off-site residential properties from adverse visual impacts from commercial signage, and that this is a legitimate government function. Nor is there any question that the Taste of Thai rear sign at issue is protected commercial speech. Within the substantive due process context, the Appellant’s contention that the rezone regulation is unduly oppressive depends on an argument that, if the governmental means are ineffective or inappropriate, then the public side of the scale lacks any substantial content and the restriction is oppressive, per se.
12. The Appellant’s essential argument can be summarized as follows: rezone condition No. 30 allows only directional signs to be constructed on the rear walls of the Commercial Center buildings. KCC 21A.06.1105 defines “directional sign” as “a sign designed to guide or direct pedestrian or vehicular traffic to an area, place or convenience, and may include incidental graphics such as trade names and trademarks.” Within the Community Business zone, KCC 21 A.20.100 allows on-premises wall signs to be constructed, provided they do not comprise more than 15% of the building façade on which they are located. Taste of Thai’s rear wall has an area of 720 square feet. 15% of 720 square feet is 108 square feet, which is the allowable maximum square footage for a wall sign under the code provision. The current Taste of Thai rear wall sign occupies 28 square feet in area. The Appellant could therefore replace the existing commercial sign with a directional sign nearly four times as large, on which its name and logo could be included. Since the visual impact of rear wall signs is proportional to their size and unrelated to the specific message of the signage, the conclusion is that enforcement of the directional sign restriction contained in rezone condition No. 30 would not advance the substantial government interest for which it was enacted.
13. The problem with the Appellant’s argument is that the sign provisions contained in KCC Title 21A, including the definition of a “directional sign” quoted above, had not yet been enacted in 1993 when the Klahanie Commercial Center rezone was approved. At that time the County was still operating under the provisions of the Title 21 Zoning Code. Therefore the relevant regulatory context for assessing the legality of the rezone conditions—if such evaluation is indeed required—is Title 21 and not Title 21A.

14. KCC Title 21 contains only rudimentary sign regulations. It provides no definition for “directional signs,” the chapter devoted to signage generally (21.53) only seeks to regulate billboards, and for the BC zone specifically on-premises signs are permitted “without limitation as to the size and the number” (21.28.020.N). In short, the framework provided by Title 21 does not create the kinds of regulatory distinctions essential to the Appellant’s argument. Therefore, the argument lacks a foundation within the regulatory scheme and becomes immaterial and without merit.
15. The paucity of regulatory standards within Title 21 governing signs leaves open the issue of how large the directional signs authorized by rezone condition No. 30 may be. Although not necessary in order to decide this appeal, the answer to that question is probably that DDES has discretionary latitude to approve those directional signs that are consistent with the rezone purpose of limiting visual impacts to offsite residential properties. In this regard KCC 21A.20.060E suggests that signs which serve a purely directional function ought not exceed 6 square feet in surface area. While not a mandatory requirement for interpreting the 1993 rezone decision, this standard provides a useful legislative benchmark that may assist DDES in the exercise of its discretionary authority.
16. Although not a major element in the Appellant’s argument, we also conclude that the condition No. 30 restriction does not impinge upon noncommercial speech and is tailored to reach no further than necessary to achieve its legitimate governmental objective. Both on-premises commercial signs and directional signs are forms of commercial speech. While they each have visual impacts on off-site residential occupants, the decision by the County to allow directional signs only is supported by a policy to promote efficient circulation of traffic into the Commercial Center, thereby reducing traffic congestion and inadvertent risk to pedestrians from confused drivers. The fact that directional signs are allowed to carry incidental commercial information simply underscores the reasonableness of the restriction, which serves both a public informational interest while allowing limited commercial advertising speech to occur. These kinds of policy-based distinctions between different types of commercial speech were found permissible by the United States Supreme Court in the *Metromedia* case cited above.
17. Finally, the Appellant has raised issues in its written materials that were not the subject of hearing testimony or argument. First, there is the contention that a code enforcement proceeding cannot be brought against a commercial tenant with respect to a rezone condition that is not a codified rule of general applicability. It is clear, however, that the definitions of “civil code violation” and “person responsible for code compliance” stated at KCC 23.02.010 establish that permit conditions adopted by ordinance, whether codified or not, are subject to the code enforcement process and that tenants are liable for the violation of such conditions.
18. The Appellant has also argued that the first sentence of rezone condition No. 30 is void for vagueness because the Title 21A Zoning Code definition of “directional sign” contains an ambiguous reference to “incidental graphics” of a commercial nature. While under appropriate circumstances this may be an interesting legal question, as DDES suggests the Appellant has no standing to raise it because the structure subject to this enforcement appeal possesses no characteristics that would qualify it as a directional sign. Moreover, as noted above, the proper legal context for evaluating the rezone conditions is KCC Title 21, not 21A.

19. The Taste of Thai rear wall sign cited within the supplemental notice and order violates rezone condition No. 28 because it is more than 10 feet high, and condition No. 30 because it does not meet the requirements for a directional sign. The terms of building permit No. B99A1147 are modified consistent with these findings and conclusions.

DECISION:

The appeal is DENIED.

ORDER:

No penalties shall be incurred if the Appellant performs the following action with 60 days of the date of this order:

1. Removes the signage from the western rear wall of its leasehold building.

ORDERED this 23rd day of January, 2001.

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 23rd day of January, 2001, by certified mailing to the following parties:

Katriana L. Samiljan	Patrick J. Schneider	Taste of Thai
Stoel Rives	Stoel Rives	4512 Klahanie Drive SE
600 University Street #3600	600 University Street #3600	Issaquah WA 98029
Seattle WA 98101-3197	Seattle WA 98101-3197	

TRANSMITTED this 23rd day of January, 2001, to the following parties and interested persons:

Parks & Ginger Anderson	Shannon Barkels	Phil Davidson
4617 - 252nd Avenue SE	Klahanie HOA	Claremont Development Company
Issaquah WA 98027	P.O. Box 1	515 - 116th Avenue NE #108
	Issaquah WA 98027	Bellevue WA 98004
Alan Ferin	Seyed Safavin	Katriana L. Samiljan
Hogate/Klahanie LLC	Klahanie HOA	Stoel Rives
1017 Minor Avenue #1001	P. O. Box 1	600 University Street #3600

Seattle WA 98104	Issaquah WA 98027	Seattle WA 98101-3197
Patrick J. Schneider Stoel Rives 600 University Street #3600 Seattle WA 98101-3197	Taste of Thai 4512 Klahanie Drive SE Issaquah WA 98029	Marie Thompson Klahanie Homeowners Association P.O. Box 1 Issaquah WA 98027
Jeri Breazeal DDES/Building Services Div Code Enforcement Section MS OAK-DE-0100	John Briggs KC Prosecuting Attorney Civil Division MS KCC-PA-0550	Roger Bruckshen DDES/BSD Code Enforcement Section MS OAK-DE-0100
Elizabeth Deraitus DDES/BSD Code Enforcement Section MS OAK-DE-0100		

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE DECEMBER 1, 2000 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E9900061H – TASTE OF THAI:

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing and representing the Department was Jeri Breazeal and John Briggs from the King County Prosecuting Attorney's Office. Participating in the hearing and representing the Appellant were Attorneys Katriana Samiljan and Patrick Schneider; also Appellant Pamela Juntara. Other participants in this hearing were Phil Davidson and Ken Dinsmore.

The following exhibits were offered and entered into the record:

- Exhibit No. 1 DDES staff report to the Hearing Examiner, dated December 1, 2000
- Exhibit No. 2 Notice & Order, issued February 16, 2000
- Exhibit No. 3 Appeal Notice & Statement, received March 13, 2000
- Exhibit No. 4 Supplemental Notice & Order, issued July 25, 2000

- Exhibit No. 5 Amended Appeal, received August 15, 2000
- Exhibit No. 6 November 3, 1999 letter sent to Taste of Thai
- Exhibit No. 7 Copy of approved sign permit that was part of the sign permit B99A1147
- Exhibit No. 8 Pre-Hearing Order, dated July 13, 2000
- Exhibit No. 9 Copy of photographs
- Exhibit No. 10 Rezone Conditions
- Exhibit No. 11 Minutes of March 22, 2000 DDES Regulatory Review Committee meeting
- Exhibit No. 12A-12C Photographs
- Exhibit No. 13 Site plan
- Exhibit No. 14 E-mail correspondence between Elizabeth Lee and Karen Scharer/Ken Dinsmore and Maihoa Pham
- Exhibit No. 15 E-mail correspondence between Jeri Breazeal and Lisa Lee